U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUL 0 5 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a special education teacher for (PGCPS). The petitioner teaches at Maryland. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and copies of standardized test scores.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on April 19, 2012. In an accompanying statement, counsel stated that the petitioner's "petition for waiver of the labor certification is premised on her Master's Degree in Special Education . . . , Forty-two semester credit hours of transfer credit . . . [and] more than three decades (30 years) of dedicated and progressive teaching experience . . . and the commendations and recognitions received by her."

Academic degrees, experience, and recognition for achievements and contributions are elements that can contribute toward a finding of exceptional ability. *See* 8 C.F.R. §§ 204.5(k)(3)(ii)(A), (B), and (F), respectively. Exceptional ability, in turn, is not self-evident grounds for the waiver. *See* section 203(b)(2)(A) of the Act. Particularly significant forms of recognition can indicate broader impact and influence, but the burden is on the petitioner to establish as much. *See* section 291 of the Act, 8 U.S.C. § 1361.

With respect to the beneficiary's "commendations and recognitions," the record contains copies of certificates from officials of and local school officials with jurisdiction over that school, praising the petitioner as "very diligent and resourceful in all aspects," acknowledging her work with local and as secretary of the parent-teacher association.

Counsel stated that the petitioner

> has an exceptional ability and proficiency not only as a Special Education Chairperson and Special Education Resource Teacher but also as a Textbook Writer and a Textbook Reviewer. She co-authored two published books in entitled and co-authored 1 published book in entitled ' As a Textbook Reviewer, she reviewed the textbook

Setting aside the question of whether writing three books and reviewing a fourth amount to "exceptional ability and proficiency . . . as a Textbook Writer and a Textbook Reviewer," the standard for the waiver is not "exceptional ability and proficiency." Furthermore, all of the identified examples date from nearly a decade before the petition's filing date. The petitioner did not claim that she has written or reviewed textbooks in the United States or has any reasonable prospects to do so.

Counsel asserted that, despite "the unfortunate incident that happened to the school system and the entire nation as a whole remain in need of [the petitioner's] professional services." Counsel did not identify or describe "the unfortunate incident," but it is a matter of public record that the Department of Labor invoked the debarment provisions of section 212(n)(2)(C)(i) of the Act against owing to certain immigration violations by that employer. As a result, between March 16, 2012 and March 15, 2014, USCIS cannot approve any employment-based immigrant or nonimmigrant petitions filed by PGCPS.[1]

Nevertheless, before the debarment occurred, filed a Form I-140 petition on the beneficiary's behalf on July 8, 2009, with an approved labor certification filed on September 28,

[1] The list of debarred employers is available online at http://www.dol.gov/whd/immigration/H1BDebarment.htm (printout added to record June 18, 2013).

2008. The Texas Service Center approved that petition, classifying her as a professional under section 203(b)(3) of the Act. By applying for the national interest waiver, the petitioner has sought an exemption from a requirement that she has already met.

The petitioner submitted letters from administrators, teachers, students, and parents of students. The witnesses praised the petitioner's skill and dedication, but did not indicate that the petitioner's activities in the area of special education have had more than a local effect.

The director issued a request for evidence on June 26, 2012, instructing the petitioner to "submit evidence to establish that the beneficiary's past record justifies projections of future benefit to the nation." The director requested documentation of the petitioner's past accomplishments, and stated that the petitioner must establish the significance and scope of claimed awards.

In response, counsel stated:

> Since a 'National Special Education Teacher' is not even a real concept but more of metaphysical cognition [*sic*], undersigned wishes to once again posit a realistic proposition upon which to establish that the self-petitioner's contributions will impart national-level benefits.
>
> Even authors of books, treatises and other academic materials on Special Education are not in any standing [*sic*] to claim that their contributions are national in scope since not all special education teachers can be said to utilize their works.

The director did not require that the petitioner show that she is "a 'National Special Education Teacher,'" or that "all special education teachers . . . utilize [her] works." National scope is not the same as universal reliance on the petitioner's work.

Counsel stated: "it is but harmless to assert that if an NIW Petition is made with premise on some prevailing Acts of United States Congress, that by itself renders the proposed employment national in scope." All employment-based immigrant classifications are based on "prevailing Acts of United States Congress," and so is the statutory job offer requirement. Congress could supersede this requirement by passing new legislation specifically exempting special education teachers from the job offer requirement, but counsel did not show that Congress has in fact done so. Instead, counsel claimed that other legislation implies such an exemption even though that legislation does not mention immigration. Even if counsel had shown that special education meets the "national scope" prong of the *NYSDOT* test, national scope is not sufficient to establish eligibility for the waiver.

Counsel quoted remarks made by then-President George H.W. Bush when he signed the Immigration Act of 1990, which created the national interest waiver: "This bill provides for vital increases for entry on the basis of skills, infusing the ranks of our scientists and engineers and educators with new blood and new ideas." Counsel interpreted this passage to mean that Congress created the national interest waiver for educators. The Immigration Act of 1990, however, was not

restricted to the creation of the waiver. It was, rather, a comprehensive bill that, among other things, expressly subjected members of the professions to the job offer requirement, and defined school teaching as a profession. *See* sections 203(b)(2)(A) and 101(a)(32) of the Act.

Counsel cited other legislation and court cases, all of which affirmed the importance of education but none of which exempted teachers from the job offer requirement at section 203(b)(2)(A) of the Act.

Counsel acknowledged that the job offer/labor certification requirement exists to protect United States workers. Counsel contended that a waiver of that requirement would serve the same ultimate goal, by allowing the petitioner to train "today's students [who] need to be academically competitive to guarantee their employability." Counsel further stated: "today's United States workers or Special Education Teachers are not as competitive as the foreign teachers who are already in the country since not all of them were educated by 'Highly Qualified Teachers.'" This assertion relies on the presumption that all "foreign teachers" "were educated by Highly Qualified Teachers." Counsel cited no evidence to support that claim. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel's response to the request for evidence includes several variations on one central theme, that "foreign teachers," as a class, are eligible for a blanket waiver of the job offer requirement. The petitioner offered no direct support for this claim, leaving counsel to rely instead on indirect inferences that do not withstand scrutiny.

According to counsel's own statistics, the petitioner's credentials do not readily stand out. Specifically, counsel asserted that "59% [of] special educators in the nation [hold] a Master's degree or equivalent," and "92% [of] special educators [have] full certification."

Counsel asserted that the petitioner possesses qualifications above the bare minimum required for the job she seeks, but cannot "tailor-fit" an application for labor certification to show those qualifications. The Department of Labor, however, has already approved a labor certification for the petitioner, which led to an approved immigrant petition. Therefore, counsel cannot show that the petitioner is unable to obtain labor certification. At most, counsel has shown that the petitioner cannot obtain labor certification suitable for a higher priority immigrant classification.

Counsel cited a study showing that special education teachers "shift careers" and move to general education, and therefore "[t]he protection afforded for US workers enshrined in the labor certification process will not in any way be jeopardized by grant of waiver in favor of" the petitioner. The statutory standard is that the waiver will serve the national interest, and counsel's observation does not address that standard. Similarly, under the regulation at 8 C.F.R. § 103.3(c), *NYSDOT* is binding precedent on all USCIS employees, and counsel has cited no superseding authority that directly addresses the issue of labor certification for teachers.

Many of the exhibits submitted in response to the request for evidence consisted of general evidence about immigration policy or special education. The only material specific to the petitioner consisted of photocopies of the beneficiary's textbooks. The books are in the Filipino language rather than English, with no submitted translation. Such a translation would be necessary if the petitioner wished USCIS to consider the contents of the books as evidence. *See* 8 C.F.R. § 103.2(b)(3). Therefore, the petitioner did not show that the textbooks pertain to special education, her work in which forms the basis for the waiver claim.

The director denied the petition on November 7, 2012, stating that the petitioner had not met the requirements set forth in *NYSDOT*. The director asserted that, in the aggregate, "teaching is in the national interest, [but] the impact of a single Special Education teacher in Maryland" is local and does not warrant the national interest waiver.

On appeal, counsel asserts that, at the time of *NYSDOT*'s publication in 1998, there was no "clear-cut Congressional standard" for the national interest waiver. Counsel further contends that, by passing the No Child Left Behind Act (NCLBA) in 2001 (three years after *NYSDOT*), "the United States Congress . . . has preempted the USCIS with respect to" the national interest waiver for educators. Counsel, however, identifies no specific legislative or regulatory provisions that exempt school teachers from *NYSDOT* or reduce its impact on them.

The NCLBA did not amend section 203(b)(2) of the Act. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95, 113 Stat. 1312 (1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*, counsel has not made a persuasive claim that the NCLBA indirectly implies a similar legislative change.

Turning to immigration legislation, counsel states:

> With respect to the E21 visa classification, INA § 203(b)(2)(A) provides in relevant part that: "Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the **national . . . educational interests**, . . . of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States."

Counsel, above, highlighted the abridged phrase "national educational interests," but the very same quoted passage also includes the job offer requirement, *i.e.*, the requirement that the alien's "services . . . are sought by an employer in the United States." Counsel has, thus, directly quoted the section of relevant law that supports the director's conclusion. By the plain wording of the statute that counsel quotes on appeal, an alien professional holding an advanced degree is presumptively subject to the job offer requirement, even if that alien "will substantially benefit prospectively the national

. . . educational interests . . . of the United States." Neither the Immigration and Nationality Act nor the NCLBA, nor any other identified statute, regulation, or case law, create or imply any blanket waiver for teachers.

Counsel discusses the "achievement gap" that continues to challenge educators nationwide. Although closing that gap may be a national goal, it does not follow that the petitioner's efforts toward that goal are, themselves, national in scope. Counsel contends that the petitioner "is an effective teacher in raising student achievement in STEM" (science, technology, engineering and mathematics), but cites no evidence to support this claim. Instead, counsel cited statistics showing "that out of the 24 Maryland school districts ranked near the bottom" in 2012 and "did not meet its Reading proficiency AMO targets." The petitioner has not shown that her efforts have resulted in measurable overall improvements or transformed into a model that other districts seek to emulate.

Counsel contends that factors such as "the 'Privacy Act' protecting private individuals" make it "impossible" to compare the petitioner with other qualified workers. Counsel's contention rests on the assumption that the *NYSDOT* guidelines involve an item-by-item comparison of an alien's credentials with those of qualified United States workers. To the contrary, the key provision in *NYSDOT* is that the petitioner must establish a record of influence on the field as a whole. *Id.* at 219, n.6. To do so does not require an invasive review or comparison of other teachers' credentials.

Counsel stated that a waiver would ultimately serve the interests of United States teachers, because if schools "fail to meet the high standard required under the No Child Left Behind (NCLB) Law," the result would be "not only . . . closure of these schools but [also] loss of work for those working in those schools." Counsel does not document "closure of . . . schools" for failing to meet NCLBA requirements.

Counsel emphasized "the 'Urgent Need' for 'Highly Qualified Teachers,'" and claimed that the labor certification process cannot accommodate this need because "[t]he United States Department of Labor minimum education requirement . . . for Elementary School teacher is just a bachelor's degree."

Section 9101(23) of the NCLBA defines the term "Highly Qualified Teacher." Briefly, by the statutory definition, a "Highly Qualified" elementary school teacher:

- has obtained full State certification as a teacher or passed the State teacher licensing examination, and holds a license to teach in such State;
- holds at least a bachelor's degree; and
- has demonstrated, by passing a rigorous State test, subject knowledge and teaching skills in reading, writing, mathematics, and other areas of the basic elementary school curriculum, or (in the case of experienced teachers not "new to the profession") demonstrates competence in all the academic subjects in which the teacher teaches based on a high objective uniform State standard of evaluation.

Section 9101(23)(A)(ii) of the NCLBA further indicates that a teacher is not "Highly Qualified" if he or she has "had certification or licensure requirements waived on an emergency, temporary, or provisional basis."

The *Occupational Outlook Handbook* describes what the Department of Labor considers to be the minimum qualifications necessary to become an elementary school teacher:

> Public school teachers are required to have a least a bachelor's degree and a state-issued certification or license. . . .
>
> **Education**
>
> All states require public special education teachers to have at least a bachelor's degree. Some of these teachers major in elementary education or a content area, such as math or chemistry, and minor in special education. Others get a degree specifically in special education. . . .
>
> **Licenses**
>
> All states require teachers in public schools to be licensed. A license is frequently referred to as a certification. . . .
>
> Requirements for certification vary by state. However, all states require at least a bachelor's degree. They also require completing a teacher preparation program and supervised experience in teaching, which is typically gained through student teaching. Some states require a minimum grade point average.
>
> Many states offer general special education licenses that allow teachers to work with students across a variety of disability categories. Others license different specialties within special education.
>
> Teachers are often required to complete annual professional development classes to keep their license. Most states require teachers to pass a background check. Some states require teachers to complete a master's degree after receiving their certification.[2]

The petitioner has not established that the "Highly Qualified" standard involves requirements that are significantly more stringent than those outlined in the *Occupational Outlook Handbook*, or that a public school could not obtain a labor certification for a "Highly Qualified Teacher." Indeed, the

[2] Source: http://www.bls.gov/ooh/education-training-and-library/special-education-teachers.htm#tab-4 (printout added to record June 20, 2013).

petitioner's own approved labor certification required her to hold a bachelor's degree in education, and to "have or be immediately eligible for Maryland Teaching Certificate," elements consistent with the "Highly Qualified" designation.

As is clear from a plain reading of the statute, engaging in a profession (such as teaching) does not presumptively exempt such professionals from the requirement of a job offer based on national interest. Congress has not established any blanket waiver for teachers. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.